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November 22, 1996

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

BY HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: **In the Matter of Advanced Television Systems and
Their Impact upon the Existing Television Broadcast
Service, MM Docket No. 87-268**

Dear Mr. Caton:

On behalf of Grupo Televisa, S.A., we are transmitting herewith an original and nine copies of "Comments" in the above-referenced proceeding.

A "Return Copy" of this filing is also enclosed. Please date-stamp the "Return Copy" and return it to confirm your receipt.

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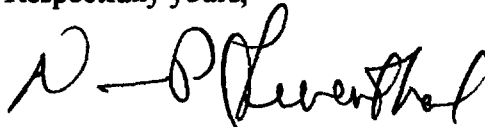
Mr. William F. Caton

November 22, 1996

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Should you have any questions, please contact undersigned counsel.

Respectfully yours,

A handwritten signature in black ink, appearing to read "N. P. Leventhal". The signature is fluid and cursive, with the first name "N." and last name "Leventhal" clearly distinguishable.

Norman P. Leventhal

Barbara K. Gardner

NPL/vlp
Enclosures

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of)	
)	
Advanced Television Systems)	
and Their Impact upon the)	MM Docket No. 87-268
Existing Television Broadcast)	
Service)	

To: The Commission

COMMENTS OF GRUPO TELEVISA, S.A.

Grupo Televisa, S.A. ("Televisa"), by its attorneys, hereby comments on the Commission's Sixth Further Notice of Proposed Rulemaking in the above-captioned proceeding, FCC 96-317 (released August 14, 1996) ("Sixth Further NPRM"). The purpose of these comments is to draw attention to a fact only briefly touched upon in the Sixth Further NPRM — that the draft digital television ("DTV") Table of Allotments contained therein conflicts with existing agreements between the United States and Mexico that govern the allotment of television channels in both countries. Those conflicts must be resolved.

INTRODUCTION

In the Sixth Further NPRM, the Commission issued a draft Table of Allotments for digital television broadcasting that includes proposed allotments and assignments for current broadcast stations along the United States-Mexico border, from California in the west to Texas in

the east. The service areas of many U.S. television stations extend into Mexico; similarly, many Mexican stations serve portions of the United States. At present, two separate bilateral agreements govern the allotment and assignment of VHF and UHF frequencies in border areas.¹ These agreements serve to prevent television broadcast interference along the border.

Televisa, Mexico's largest television broadcaster, owns or is affiliated with 36 television stations along the United States-Mexico border, including three stations affiliated with the Fox television network. Of these stations, 24 occupy the UHF frequency band, including two Fox affiliates and other stations serving such markets as Ensenada, Tijuana, Mexicali, Nuevo Laredo, Reynosa, and Matamoros. As is now shown, the VHF and UHF Agreements are and remain the binding law of the United States, and may not be altered without negotiations conducted by the proper authorities under the supervision of the State Department. Accordingly, the numerous conflicts with the UHF Agreement reflected in the FCC's draft DTV Table of Allotments must be resolved.

¹ 1962 UNITED STATES-MEXICO VHF TELEVISION AGREEMENT, as modified in 1988 ("VHF AGREEMENT"); 1982 AGREEMENT RELATING TO ASSIGNMENTS AND USAGE OF TELEVISION BROADCASTING CHANNELS IN THE FREQUENCY RANGE 470-806 MHz (CHANNELS 14-69) ALONG THE UNITED STATES-MEXICO BORDER, as modified in 1988 ("UHF AGREEMENT").

**I. THE EXISTING VHF AND UHF AGREEMENTS
BETWEEN THE UNITED STATES AND MEXICO
ARE VALID EXECUTIVE AGREEMENTS, FULLY
ENFORCEABLE UNDER UNITED STATES LAW.**

The VHF and UHF Agreements are “sole executive agreements,” a form of international agreement entered into pursuant to the constitutional authority of the President.² Both agreements, as well as their 1988 modifications (“VHF and UHF Agreement Modifications”), were signed by the then-United States ambassadors to Mexico. A person is authorized to represent the United States for purposes of concluding an international agreement if, among other things, s/he presents “full powers,”³ described in the Third Restatement as “a document from a competent authority designating a person or persons to represent the state in relation to an international agreement.”⁴ Since ambassadors negotiating on behalf of the United States normally are provided with full powers,⁵ the presumption arises that the ambassadors who executed the VHF and UHF Agreements had such powers, thus making these agreements valid “sole executive agreements.”

² DEPARTMENT OF STATE, HANDBOOK ON TREATIES AND OTHER INTERNATIONAL AGREEMENTS, § 721.2(b)(1)-(3) (1955) (“CIRCULAR 175 PROCEDURE”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 302(2)-(4) (1986) (“THIRD RESTATEMENT”).

³ CIRCULAR 175 PROCEDURE, § 722.1; THIRD RESTATEMENT, § 311(2).

⁴ THIRD RESTATEMENT, § 311, cmt. b.

⁵ Id.

Such agreements are considered the supreme law of the land with respect to any conflicting provisions of state law.⁶ In addition, a sole executive agreement that does not conflict with any law of Congress is considered a fully enforceable law, binding on the parties to the agreement and required to be performed by them in good faith.⁷

By their terms, modifications of the VHF and UHF Agreements can only occur by mutual agreement between the proper American and Mexican officials. Any changes made to the Agreements, or to the allotments they contain, become effective only with the exchange of diplomatic notes.⁸ In general, the State Department coordinates and controls international negotiations, requiring that anyone engaged in the negotiation, extension, revision, or termination of international agreements on matters of substance receive written authorization from the Department before entering into such negotiations.⁹ Thus, at some level, the State Department must be involved in any international negotiations concerning the VHF and UHF Agreements.

Televisa respectfully submits that the status of the VHF and UHF Agreements as sole executive agreements precludes the Commission from unilaterally modifying their terms. Nevertheless, as is shown below, the draft DTV Table of Allotments effectively constitutes just

⁶ CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, PREPARED FOR THE SENATE COMM. ON FOREIGN RELATIONS, 103RD CONG., 1ST SESS., REPORT ON TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 53, at 65 (Comm. Print 1993) ("STUDY"); THIRD RESTATEMENT, § 303, cmt. j.

⁷ THIRD RESTATEMENT, § 321.

⁸ VHF AGREEMENT, para. J, no. 3; VHF AGREEMENT MODIFICATIONS, para. O.

⁹ CIRCULAR 175 PROCEDURE, § 722.1.

such a unilateral modification. Thus, the draft Table must be modified to conform to the requirements of the Agreements.

II. THE DRAFT DTV TABLE OF ALLOTMENTS SHOULD BE MODIFIED TO CONFORM TO THE UNITED STATES-MEXICO UHF AGREEMENT.

In a footnote in the Sixth Further NPRM, the Commission briefly acknowledges that some of the channels proposed for United States DTV use in the draft DTV Table of Allotments “are not fully compliant with the existing U.S.-Mexican agreement.”¹⁰ To rectify this situation, the Commission states that it will “work with the Mexican government to clarify the status of DTV allotments in border areas.”¹¹ Televisa respectfully submits that given the UHF Agreement’s status as binding U.S. law, proper coordination with the Mexican government must be accorded a far higher priority than the FCC’s passing reference suggests is currently intended.

A. The Draft DTV Table of Allotments Conflicts with the UHF Agreement.

There can be no doubt that the existing VHF and UHF Agreements control all television allotments along the common U.S.-Mexico border. By its terms, the UHF Agreement “shall govern the assignment and utilization of the fifty-six (56) channels in the ultra high frequency broadcasting band in the United States of America and the United Mexican States at

¹⁰ Sixth Further NPRM, para. 89, footnote 93.

¹¹ Id.

locations within 320 kilometers (199 miles) of the land border between the two countries.”¹²

With respect to VHF allotments, the VHF Agreement governs “the assignment and use of twelve (12) television channels between 54 and 216 megacycles/second along the border of the United States of America and United Mexican States, within an area of 400 kilometers in width on either side of this border.”¹³ Together, the UHF and VHF Agreements have served to provide adequate spectrum to broadcasters on both sides of the border while ensuring that broadcast signals would be free from unnecessary interference.

Regrettably, however, the Commission’s draft DTV Table of Allotments disrupts the previously negotiated harmony among border broadcasters: it conflicts in over 50 instances with minimum mileage separation requirements under the UHF Agreement.¹⁴ These conflicts are caused, in part, by the new methodology utilized by the Commission in creating the draft DTV Table of Allotments. The current VHF and UHF Agreements rely on required minimum mileage separations (together with maximum power and antenna height combinations) to assure the

¹² UHF AGREEMENT, § A, para. 1.

¹³ VHF AGREEMENT, § A, para.1.

¹⁴ Meeting between the undersigned and personnel from the Commission’s Office of Engineering and Technology, October 4, 1996. Our present understanding is that there are no conflicts with the VHF Agreement. However, as shown in the Attachment hereto, the draft Region 1 ATV plan of the U.S. Broadcasters Caucus allots Channel 6 to KTLA, Los Angeles, in direct contravention of the VHF Agreement, which allots that frequency to Tijuana, Baja California (where it is assigned to Televisa-owned XETV, the Fox affiliate in the Tijuana-San Diego market). There are no Channel 6 allotments in that portion of California covered by the VHF Agreement, which includes the Los Angeles area. Further, any Channel 6 allotment would create a conflicting relationship with the educational FM stations in the Los Angeles area.

absence of interference between U.S. and Mexican stations. By contrast, the Commission's DTV allotment methodology is based on service replication and interference considerations, rather than minimum spacing standards.¹⁵ Televisa submits that this new methodology inevitably creates conflicts with Mexican stations, since it ignores the minimum mileage separations which form the premise of both the VHF and UHF Agreements, yet attempts to fully replicate existing U.S. broadcasters' current service areas.

While the transition to digital television may not have been contemplated at the time the United States and Mexico entered into the VHF and UHF Agreements, the emergence of the new technology does not constitute sufficient changed circumstances to allow the Commission to disregard the Agreements. On occasion, a treaty or agreement may become inapplicable due to a fundamental change of circumstances, but for this doctrine to apply, new circumstances not foreseen by the parties must arise that radically "transform the extent of obligations still to be performed under the agreement."¹⁶ Because cross-border spectrum allocation and interference issues have remained substantially unchanged even as the technology has evolved, the transition to digital television cannot be viewed as a radical change permitting the FCC to disregard the existing bilateral Agreements.

¹⁵ Sixth Further NPRM, paras. 13, 82.

¹⁶ THIRD RESTATEMENT, § 336.

B. Rule 73.1650 Requires the Commission to Adhere to the VHF and UHF Agreements.

Under its own rules, the Commission must continue to adhere to the VHF and UHF Agreements. Rule 73.1650 provides that “[t]he rules in this part 73, *and authorizations for which they provide*, are subject to compliance with the international obligations and undertakings of the United States.”¹⁷ The Rule itself specifically covers the bilateral agreements between the United States and Mexico relating to television broadcasting.¹⁸ Thus, the Agreements fully bind the Commission.

To date, the existing Agreements have not been revoked, nor have they been modified to reflect the introduction of DTV. Although negotiations between the U.S. and Mexican governments may be ongoing, no new agreement or modification reflecting the transition to digital television has yet emerged. Without any such agreement, Rule 73.1650 continues to require compliance with the existing VHF and UHF Agreements. Therefore, all affected allotments and assignments in the draft DTV Table of Allotments must be conditioned on compliance with the existing VHF and UHF Agreements. For the 57 proposed allotments and assignments known to conflict with the UHF Agreement, activation of these channels is prohibited under that Agreement until such time as the Agreement is modified through bilateral negotiations. Alternatively, and preferably, the draft DTV Table of Allotments should be altered

¹⁷ 47 C.F.R. § 73.1650(a) (emphasis added).

¹⁸ 47 C.F.R. § 73.1650(b)(4)(iii).

to remove the conflicts.

**C. The Commission Should Modify the Draft DTV Table of Allotments
so as to Eliminate Conflicts with the UHF Agreement.**

Televisa supports the Commission's effort to facilitate the transition within the United States to digital television broadcasting. Self-evidently, for such a transition to be fully effective, the United States and the Mexican government must fully cooperate and coordinate with each other. But as shown above, portions of the Commission's draft DTV Table of Allotments amount to an impermissible unilateral modification of the existing UHF Agreement. Such a modification by the Commission does not promote good faith negotiations between the United States and Mexico, and makes a balanced agreement on allotments more difficult to achieve.

Televisa respectfully submits that the Commission should revise the draft DTV Table of Allotments both to bring the proposal into compliance with the existing UHF Agreement, and to promote good faith negotiations over the future status of all DTV allotments.¹⁹ The Agreements themselves, as well as the Commission's own rules, mandate adherence to the Agreements, and the Commission should demonstrate its commitment to honoring these international agreements. Such a demonstration will allow the Mexican government to engage in DTV negotiations, confident that any negotiated table of allotments will be complied with by both parties. In addition, a revision of the current draft DTV Table of Allotments will reassure

¹⁹ One possible approach by the Commission might be to include all existing Mexican stations in the computer model used to formulate the draft DTV Table of Allotments.

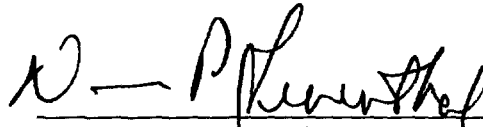
American broadcasters in border areas that they need not fear conflicting signals emanating from south of the border.

CONCLUSION

For the foregoing reasons, the Commission should revise the draft DTV Table of Allotments to comply with the existing United States-Mexico UHF Agreement.

Respectfully submitted,

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November 22, 1996

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